



2002

Oath Taking, Truth Telling, and Remedies in the  
Business World: Hearing Before the H. Comm. on  
Energy and Commerce, 107th Cong., July 26, 2002  
(Statement of Sherman Cohn, Prof. of Law, Geo. U.  
L. Center)

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# OATH TAKING, TRUTH TELLING, AND REMEDIES IN THE BUSINESS WORLD

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## HEARING BEFORE THE SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED SEVENTH CONGRESS SECOND SESSION

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than religious principle. The fact that governmental institutions have downplayed the role of religion, particularly Christianity, starting in the last half of the twentieth century, is arguably a key factor in the decline of national morality, including the recent ethical failures in business. Government should include and encourage the active participation of people of faith and the inclusion of religious principle in the public arena. This would almost certainly be a step in the right direction of inspiring ethical behavior in American society, including the business community. In the aftermath of 9-11, I am encouraged by the re-focus on valor, public-spiritedness, and other godly values. As President Bush leads our nation, I am grateful that he reads the Bible and spends time in prayer. He affirms our national motto: In God we trust.

Rules and regulations of government cannot preserve a free and ethical society whose people lack integrity. Ethics is the heart of America's economic and social freedom. Unethical behavior is a dagger in the heart. According to business textbooks, top management sets the ethical direction for the firm. Company policies and internal controls are ineffective without ethical leadership from the top. Likewise, the political leaders of our nation set the tone for its citizens. Laws and regulations will do far less than your example.

Mr. STEARNS. Thank you, Dr. Smith.  
Professor Cohn.

**STATEMENT OF SHERMAN L. COHN, PROFESSOR OF LAW,  
GEORGETOWN UNIVERSITY LAW CENTER**

Mr. COHN. Thank you very much for the invitation and for hearing us out on these very important issues.

I associate myself with what my two colleagues to my right have already said, and I am not going to repeat it.

Mr. STEARNS. You might just move the microphone just a little. That is good.

Mr. COHN. Thank you. I would like to focus on the role of lawyers. I teach legal ethics at Georgetown. I practice it in many ways. I tell my students that the most important ethical question is the one you ask yourself in front of the mirror as to who you are, and that every lawyer at some point will have to ask that question in a very hard situation. There are many such situations.

The problem, once you get from the broad ethical precepts to application, is that there are so often conflicting precepts and how they apply. For the lawyer, you have two very fundamental values that come into conflict. One is your duty to your client, which we all hold as very important. Those of you who have had occasion to employ lawyers know that you want that lawyer to be loyal to you and to exercise the duty to you, not to the other side. But then we have the value of the duty to the system and to the public.

In the business world, where we have set up a system by which there should be checks and balances, the accountant and the accountant statements which we thought we could rely on until recently, that is a very important protection. That is a part of what our whole securities law is built on and our system is built on. The lawyer who stands there should be able to say, no, you can't do that, or I will not participate in it. And that is the conflict that occurs, because there should be some balance where the lawyer is not entirely the handmaiden of the client.

Now, clients don't generally like to hear that. They want the lawyer to do their bidding. But the lawyer should have independent judgment and should be able to say to the CEO, no matter who he is, or the financial person, or anyone else, no, this can't be done that way, and I will not participate in it if it is done. Now, that

may mean, and I tell my students this, you keep your resume ready, particularly if you are in-house counsel. Whether it is government or private, you have to be ready to walk and to give up a job and to give up all the income that comes with that position. And this is true even in large law firms where quite often you have a client such as an Enron or a Xerox or a WorldCom that gives so much into the bottom line of that business called the law firm, and at some point with your integrity you have to say, no, I can't do that, and I am ready to walk.

That is the message we convey. It is a lot harder to carry it out, and, therefore, we have set up various ethical guideposts. I have given you some excerpts from the rules of professional conduct. 1.13 says that when the corporate person with whom the lawyer is dealing is doing something wrong, it is up to the lawyer to then take it up to the highest level, which would include the board of directors, and say, there is something wrong here. Now, of course, once you do that, once you go past the person who hired you, you have to be ready to find a new job or find a new client. That is a part of it. But you go up as far as the board. If the board does not go along with you, and you think it is wrong, then at that point you have the ability and, I suggest, the duty to withdraw.

The one thing you can't do is breach your duty of confidentiality. You can't make it public. All you can do is resign. That is our system, because the duty of confidentiality is so very important. You can't participate in fraud. You can't aid it. You can't abet it.

Now, one of the aspects is where does the SEC fit in all this? Now, the SEC, does enforce illegal ethics, not as much as we would like to have them do it. One of the problems is resources. Government always has a problem with resources, and that is why this Congress almost 100 years ago, created a concept which has often been called private attorneys general in the Clayton Act, having to do with antitrust. Antitrust was so important to this Congress that it established a process of treble damages plus attorney's fees when the plaintiff wins in order to encourage private litigation. In the case of securities regulation, this Congress, in its wisdom, in 1995, went the other way and said, we just want the SEC to enforce these matters. And in the Private Securities Litigation Act they pulled back on the private attorney general concept in this area.

Now, about 30 years ago there was a case before the Supreme Court called *J.I. Case Company v. Borak*, in which the issue was whether there was to be a private cause of action to enforce a public duty. The SEC, in an amicus brief, said, we think there should be. Why? Because we don't have enough resources to enforce. I suggest that is something that needs to be rethought.

Thank you, Mr. Chairman.

[The prepared statement of Sherman L. Cohn follows:]

Testimony of

PROFESSOR SHERMAN L. COHN  
Georgetown University Law Center

U.S. House of Representatives  
Committee on Energy and Commerce  
Subcommittee on Commerce, Trade,  
and Consumer Protection

July 26, 2002

"Oath-Telling, Truth-Telling & Remedies in the Business World"

- I. My Focus: the ethics of lawyers in this context.
- II. Conflict of Roles of the Lawyer
  - A. Duty to the Client.
  - B. Duty to the System and the Public.
- III. Lawyers Ethics
  - A. Role of the American Bar Association.
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- IV. Ethical Codes
  - A. Canons of Professional Ethics – 1908
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  - D. Ethics 2000 Commission on Evaluation of the Rules of Professional Conduct – February 2002
- V. The Ethical Obligations of the Lawyer for an Entity
  - Rule 1.13 (attached)
  - Rule 1.16 (attached)
- VI. The Duty of Confidentiality
  - Rule 1.6 (attached)
  - Code of Prof. Resp. Disciplinary Rule 4-101 (attached)
- VII. The Savings & Loan Scandals & the RTC



ABA Model Rules of Professional Conduct  
as amended February 2002

Note: New material added in February 2002 is underlined.  
Material stricken in February 2002 has a line through it.

Rule 1.13

Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking for reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

**RULE 1.13                    2002 ABA MODEL RULES**

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

**COMMENT****The Entity as the Client**

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] ~~In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the~~ The organization's highest authority. Ordinarily, that is to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

#### **Relation to Other Rules**

[5] The authority and responsibility provided in ~~paragraph (b) this~~ Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

#### **Government Agency**

[6] The duty defined in this Rule applies to governmental organizations. ~~However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining~~ Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it is ~~generally~~ may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government as a whole may be the client for ~~purpose~~ purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, ~~when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See note on Scope.~~

#### **Clarifying the Lawyer's Role**

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

**Dual Representation**

[9] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

**Derivative Actions**

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

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as amended February 2002

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Rule 1.16

Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client, ~~or if;~~
- (1) (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (3) (4) a the client insists upon pursuing an objective taking action that the lawyer considers repugnant or imprudent with which the lawyer has a fundamental disagreement;
- (4) (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (6) (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

#### COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

#### Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may ~~wish~~ request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

#### Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client is mentally incompetent has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See take reasonably necessary protective action as provided in Rule 1.14.

**Optional Withdrawal**

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or imprudent objective with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

**Assisting the Client upon Withdrawal**

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. ~~Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules. See Rule 1.15.~~

**Rule 1.2 Scope of Representation and Allocation of Authority  
Between Client and Lawyer**

(a) ~~A Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.~~ A lawyer shall abide by a client's decision whether to ~~accept an offer of settlement of~~ settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

~~(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.~~

**COMMENT**

**Scope of Representation Allocation of Authority between Client and Lawyer**

[1] ~~Both lawyer and client have authority and responsibility in the objectives and means of representation. The Paragraph (a) confers upon the client has the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.~~



[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[2] [4] In a case in which the client appears to be suffering mental disability diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

#### **Independence from Client's Views or Activities**

[3] [5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

#### **~~Services Limited in Objectives or Means~~ Agreements Limiting Scope of Representation**

[4] [6] The ~~objectives or~~ scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. ~~For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles.~~ When a lawyer has been retained by an insurer to represent an insured, ~~for example,~~ the representation may be limited to matters related to the insurance coverage. ~~The A~~ limited representation may be appropriate because the client has ~~limited objectives for the representation.~~ In addition, the terms upon which representation is undertaken may exclude specific ~~objectives or~~ means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude ~~objectives or means~~ actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[5] [8] ~~An agreement~~ All agreements concerning the scope of a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue. See, e.g., Rules 1.1, 1.8 and 5.6.

#### Criminal, Fraudulent and Prohibited Transactions

[6] [9] A Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer is required to give from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. The Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[7] [10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the The lawyer is required to avoid furthering the purpose assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how it the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is supposed was legally proper but then discovers is criminal or fraudulent. Withdrawal The lawyer must, therefore, withdraw from the representation, there-

~~fore, may be required~~ of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

~~[8]~~ [11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

~~[9]~~ [12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer ~~should~~ must not participate in a ~~sham~~ transaction; ~~for example, a transaction~~ to effectuate criminal or fraudulent ~~escape~~ avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

ABA Model Rules of Professional Conduct  
as amended February 2002

Note: New material added in February 2002 is underlined.  
Material stricken in February 2002 has a line through it.

Rule 1.6

**RULE 1.6 Confidentiality of Information\***

(a) A lawyer shall not reveal information relating to the representation of a client unless the client ~~consents after consultation, except for disclosures that are~~ gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, and except as stated in or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal ~~such information relating to the representation of a client~~ to the extent the lawyer reasonably believes necessary:

\* The Ethics 2000 Commission's Report recommended amending Rule 1.6 to include the following exceptions to subsection (b) of the confidentiality rule:

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

The ABA House of Delegates rejected (b)(2) and the Ethics 2000 Commission withdrew (b)(3) from consideration.

~~(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent reasonably certain death or substantial bodily harm; or~~

(2) to secure legal advice about the lawyer's compliance with these Rules;

~~(2) (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or~~

(4) to comply with other law or a court order.

**COMMENT**

~~(1) The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.~~

~~(2) The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.~~

~~[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.~~

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

~~[4] [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer maintain confidentiality of must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.~~

~~[5] [3] The principle of client-lawyer confidentiality is given effect in two by related bodies of law: the attorney-client privilege, (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not merely only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.~~

~~[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.~~

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

### Authorized Disclosure

~~[7] [5] A Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority.~~ In litigation some situations, for example, a lawyer may disclose information by admitting be impliedly authorized to admit a fact that cannot properly be disputed or, in negotiation by making to make a disclosure that facilitates a satisfactory conclusion to a matter. ~~[8]~~ Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

### Disclosure Adverse to Client

~~[9] [6] The Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.~~

~~[10] Several situations must be distinguished.~~

~~[11] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.~~

~~[12] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.~~

~~[13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.~~

~~[14] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.~~

[7] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

#### **Dispute Concerning a Lawyer's Conduct**

~~[18] [8] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.~~

~~[19] [9] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the~~

~~lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.~~

[10] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.

[11] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

[12] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[13] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(4). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

#### **Withdrawal**

[15] [14] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). [16] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. [17] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).



### **Disclosures Otherwise Required or Authorized**

~~{20}~~ The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

~~{21}~~ The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supercedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

### **Acting Competently to Preserve Confidentiality**

{15} A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

{16} When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

### **Former Client**

~~{22}~~ {17} The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

## DR 4-101

## ABA MODEL CODE

## DISCIPLINARY RULES

DR 4-101 Preservation of Confidences and Secrets of a Client.<sup>10</sup>

- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
  - (1) Reveal a confidence or secret of his client.<sup>11</sup>
  - (2) Use a confidence or secret of his client to the disadvantage of the client.
  - (3) Use a confidence or secret of his client for the advantage of himself<sup>12</sup> or of a third person,<sup>13</sup> unless the client consents after full disclosure.
- (C) A lawyer may reveal:
  - (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.<sup>14</sup>
  - (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.<sup>15</sup>
  - (3) The intention of his client to commit a crime<sup>16</sup> and the information necessary to prevent the crime.<sup>17</sup>
  - (4) Confidences or secrets necessary to establish or collect his fee<sup>18</sup> or to defend himself or his employees or associates against an accusation of wrongful conduct.<sup>19</sup>
- (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.